Supreme Court, U.S.
FILED

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No. ———

In the Supreme Court of the United States

LINDBIRG LOCKHART,
Petitioner,

v.

HOFSTRA UNIVERSITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The courts below did not adhere to this Court's established principles concerning summary judgment.

LIST OF PARTIES

Petitioner

The petitioner, Lindbirg Lockhart, has no corporate affiliations.

Respondent

The respondent is Hofstra University.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

To petitioner's knowledge, previous opinions rendered in this case have not been reported.

JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was rendered on February 18, 2005. No rehearing was requested.

This Court has jurisdiction to review the judgment or decree in question by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*

42 U.S.C. §2000e-2(a) provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

A. Relevant Facts

Petitioner is a member of the Black race. Between December, 1978 and August, 1990, petitioner was employed at respondent by Trans World Maintenance Corporation, a maintenance company which provided custodial services to respondent. While employed by Trans World, petitioner performed custodial work.

While employed by Trans World, petitioner was a member of Local 144 and, prior to 1990, served as Chief Shop Steward. As Chief Shop Steward, petitioner had oversight for grievances concerning the members of Local 144 and had responsibility, in consultation with management, for assigning overtime or selecting people for overtime. During that time period, petitioner selected people for overtime based upon seniority. There was one seniority list of custodians which covered the entire Hofstra Campus.

In August, 1990, petitioner became employed by respondent as a custodian and has been employed by respondent continuously ever since.

In 1988, petitioner and the other custodians became members of Local 424 of the United Industry Workers. At the time, petitioner moved from Chief Shop Steward to Assistant Shop Steward. Petitioner was succeeded by Robert Macaluso as Chief Shop Steward. Petitioner then, while Assistant Shop Steward, only had the responsibility of selecting people for overtime in the absence of Mr. Macaluso.

Petitioner's duties and responsibilities are the same as they were when he was employed by Trans World. In general, petitioner is responsible for buildings in the area designated as "South Campus", more particularly the Law School. There are approximately thirty-six (36) custodians assigned to the South Campus.

Subsequent to 1990, petitioner reported directly to Michael Rocchio, Assistant Director of Physical Plan Department. He continues to report to Mr. Rocchio. Mr. Rocchio, in turn, reported to and continues to report to Kenneth Tyler, Associate Director of Physical Plan Department.

Pursuant to the Collective Bargaining Agreement between respondent and Local 424, overtime is to be distributed to custodians, including petitioner, on a voluntary basis, by seniority. In accordance with this Collective Bargaining Agreement, overtime is supposed to be assigned in the order of seniority provided for in an official overtime list which is posted every week. This list contains those who wish to be considered for overtime. Individuals who wish not to be chosen are not on the list.

Messrs. Macaluso, Rocchio and Tyler are all Caucasian. Subsequent to 1990, Mr. Rocchio, in consultation with the Union, which provides the names of employees, assigned people for overtime. Mr. Macaluso and Mr. Rocchio then began regularly approving overtime for custodians in disregard of the rotation provided for in the official overtime list and by giving overtime to individuals not on the list.

The actions of respondent and its agents favored Caucasian and Hispanic custodians at the expense of Black custodians, such as petitioner. This problem began when Juan Perez became Foreman. Respondent ensured that Caucasians and Hispanics were favored.

Custodians such as Juan Perez, Joseph Montura, Pedro LaRosa, James Cameron, Jim Campbell and Vincent Avallone, all of whom are Caucasian or Hispanic, were favored and received overtime even if they were not on the list.

Respondent's attempt to justify its actions by claiming that some of these individuals could receive overtime in disregard of the overtime list because they had supervisory responsibilities or special skills is without merit and pretextual. In fact, Mr. Avallone is not even licensed to repair vacuums.

Petitioner has received his fair share of overtime within the past two years. However, before that, petitioner did not. Although the rotation based upon seniority is supposed to be based upon the entire campus, respondent has improperly attempted to circumvent the selection process by having different lists for particular portions of the campus and for different shifts. There is currently no campus-wide list. There are different numbers of custodians on each list.

Petitioner disputes the overtime hours that respondent claims he worked. A review of the time sheets offered by respondent will reveal that those off the list, such as Vincent Avallone, received a disproportionate amount of overtime.

Petitioner complained about the way overtime was being distributed. Petitioner filed grievances with the Union regarding his overtime complaints. Respondent did not remedy petitioner's grievances.

Respondent concedes that there are inequities in the amount of overtime each employee received.

B. Proceedings Below

Petitioner brought this action alleging that his employer, respondent, Hofstra University, had violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, under the theory of racial discrimination.

Respondent moved for summary judgment claiming (1) petitioner could not establish a *prima facie* case of race discrimination because there was no adverse employment action occurring under circumstances giving rise to an inference of discrimination; (2) petitioner could not show that respondent's alleged legitimate, non-discriminatory reasons for all actions taken were a pretext for discrimination. Petitioner duly opposed respondent's motion.

On March 29, 2004, the Honorable Arlene R. Lindsay, United States Magistrate Judge, issued a Decision and Order granting respondent's motion. [Pet. App. 22a]

A Judgment dated and entered March 29, 2004 followed. [Pet. App. 5a] Judgment was entered ordering and adjudging

that "plaintiff take nothing of defendant and that the defendant's motion for judgment is granted; and that the complaint is dismissed."

Petitioner duly appealed the District Court's determination to the United States Court of Appeals for the Second Circuit. In a Summary Order dated February 18, 2005, the Court of Appeals affirmed the judgment of the District Court. In so doing, the Court of Appeals held that petitioner "failed to put forward facts that satisfy the third and fourth requirements of the *prima facie* case." More specifically, the Court concluded that petitioner had failed to sufficiently establish that he suffered an adverse employment action under circumstances that give rise to an inference of discriminatory intent.

This Petition follows.

REASONS FOR GRANTING THE WRIT

1. The Courts below Did Not Adhere to this Court's Established Principles Concerning Summary Judgment

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. *See, e.g.*, Fed.R.Civ.P. 56(c); *see generally, Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment, *see, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S.144, 157 (1970), and in assessing the record to determine whether there is a genuine issue as to any material fact, the court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought, *see, e.g.,*

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The inferences to be drawn from the underlying facts revealed in materials such as affidavits, exhibits, interrogatory answers and depositions must be viewed in the light most favorable to the party opposing the motion. *See, e.g., United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

The courts below, instead of determining whether there are issues to be tried, actually tried those issues. Petitioner respectfully submits that, in doing so, the courts below did not adhere to the dictates of this Court with reference to the appropriate summary judgment standards.

A. The Applicable Legal Standard

This Court set forth the standards to be applied in this action in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-53 (1981) (citing and quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-804 (1973).

In *Burdine*, this Court held:

> "First, the plaintiff has the burden of proving by a preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant 'to articulate some legitimate, non-discriminatory reason for the employee's rejection.' Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reason but were a pretext for discrimination." *Id.* at 252-53.

By establishing a *prima facie* case, a plaintiff "creates a presumption that the employer unlawfully discriminated against the employee." *Burdine, supra.* at 254. Making out a *prima facie* case "is not a demanding burden." *Greenway v. Buffalo Hilton Hotel,* 143 F.3d 47, 52 (2d Cir. 1998). If a plaintiff successfully establishes a *prima facie* case, the burden then shifts to the defendant "to articulate some legitimate, non-discriminatory reason for the employer's [action]." *McDonnell Douglas, supra.* at 802. This reason must be "clear and reasonably specific." *Binder v. Long Island Lighting Co.,* 933 F.2d 187, 191 (2d Cir. 1991).

If the defendant carries this burden, the plaintiff must then prove "by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine, supra.* at 248. A plaintiff can establish pretext "either directly, by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence." *Burdine, supra.* at 156.

In order to establish a *prima facie* case of race/color discrimination, a plaintiff must show (1) that he/she belongs to a protected class; (2) that he/she was performing his/her duties satisfactorily; (3) that he/she suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination on the basis of his/her membership in that class. *Chambers v. TRM Copy Centers Corp.,* 43 F.3d 29, 36-37 (2d Cir. 1994). In moving for summary judgment, the respondent herein alleged and the courts below agreed that petitioner could not meet the third and fourth elements.

B. Petitioner Established That the Complained of Actions Were Adverse Employment Actions

Under this Court's standard for summary judgment, there were triable issues as to whether the complained of actions were adverse employment actions. In *Galadya v. NYC Board of Education*, 202 F.3d 636 (2d Cir. 2000), the Second Circuit recognized that "less flagrant reprisals" than termination or a reduction in wages and benefits may be sufficient. *Id.* at 640. The key, said the court, is to determine whether the alleged action creates a "materially significant disadvantage." *Id.* at 649; *see also, Campbell v. Grayline Air Shuttle Inc.*, 930 F.Supp. 794 (E.D.N.Y. 1996). In *Campbell*, the court, citing *Medwid v. Baker*, 752 F.Supp. 125, 136-37 (S.D.N.Y. 1990), also noted that "a material adverse change is one that has an attendant negative result, a deprivation of a position or an opportunity." In determining whether there is an attendant negative result, one must look at the totality of the circumstances. *Campbell, supra.* at 802-803.

In *Morris v. Lindau*, 496 F.3d 102, 110 (2d Cir. 1999), the Second Circuit also noted lesser actions may be considered adverse employment actions, citing as examples" negative evaluation letters, express accusations of lying, assignment of lunchroom duty, reduction of class preparation periods, failure to process teacher's insurance forms, transfer from library to classroom teaching as an alleged demotion, and an assignment to classroom on fifth floor which aggravated teacher's physical disabilities." *Id.* In addition, the Second Circuit has held that adverse employment actions are not limited to "pecuniary emoluments." *Preda v. Nissho Iwai Am. Corp.*, 128 F.3d 789, 791 (2d Cir. 1997).

An adverse employment action has been further defined as one which "affects the terms, privileges, duration or conditions of employment." *Dortz v. City of New York*, 904 F.Supp. 127, 155 (S.D.N.Y. 1995), *Pazamickas v. NYS Office of Mental Retardation*, 963 F.Supp. 190 (N.D.N.Y. 1997).

Therefore, petitioner respectfully submits that the alleged denial of overtime is an adverse employment action. The lower courts should have found that whether petitioner actually received more overtime than others and rejected opportunities for overtime, in the face of his denials, were triable issues of fact and should not have resulted in a finding that no adverse employment action occurred.

C. Petitioner Established That the Complained of Actions Occurred under Circumstances Giving Rise to an Inference of Discrimination

Petitioner sufficiently established that the complained of actions occurred under circumstances giving rise to an inference of discrimination. We have seen that petitioner is a member of the Black race. Pursuant to the Collective Bargaining Agreement between respondent and Local 424, overtime is to be distributed to custodians, including petitioner, on a voluntary basis, by seniority. In accordance with this Collective Bargaining Agreement, overtime is supposed to be assigned in the order of seniority provided for in an official overtime list which is posted every week. This list contains those who wish to be considered for overtime. Individuals who wish not to be chosen are not on the list.

Messrs. Macaluso, Rocchio and Tyler are all Caucasian. Subsequent to 1990, Mr. Rocchio, in consultation with the Union, which provides the names of employees, assigned

people for overtime. Mr. Macaluso and Mr. Rocchio then began regularly approving overtime for custodians in disregard of the rotation provided for in the official overtime list and by giving overtime to individuals not on the list.

The actions of respondent and its agents favored Caucasian and Hispanic custodians at the expense of Black custodians, such as petitioner. This problem began when Juan Perez became Foreman. Respondent ensured that Caucasians and Hispanics were favored.

Custodians such as Juan Perez, Joseph Montura, Pedro LaRosa, James Cameron, Jim Campbell and Vincent Avallone, all of whom are Caucasian or Hispanic, were favored and received overtime even if they were not on the list.

Respondent's attempt to justify its actions by claiming that some of those individuals could receive overtime in disregard of the overtime list because they had supervisory responsibilities or special skills was without merit and pretextual. In fact, Mr. Avallone is not even licensed to repair vacuums.

Although the rotation based upon seniority is supposed to be based upon the entire campus, respondent has improperly attempted to circumvent the selection process by having different lists for particular portions of the campus and for different shifts. There is currently no campus-wide list. There are different numbers of custodians on each list.

Petitioner disputed the overtime hours that respondent claimed he worked. A review of the time sheets offered by respondent revealed that those off the list, such as Vincent Avallone, received a disproportionate amount of overtime.

Respondent concedes that there are inequities in the amount of overtime each employee received.

Petitioner respectfully submits that all of the foregoing facts, which are supported in the record, went beyond petitioner's own "belief." As such, there were triable issues as to whether petitioner established whether the complained of actions occurred under circumstances giving rise to discrimination.

The issue of whether petitioner received more overtime than others or that he refused overtime assignments, in the fact of petitioner's denials, should have been considered an issue of fact. The courts below, based upon this Court's precedents, should not have decided this issue upon a motion for summary judgment.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 04-2290

[February 18, 2005]

LINDBIRGH LOCKHART,
Plaintiff-Appellant,

v.

HOFSTRA UNIVERSITY,
Defendant-Appellee.

PRESENT: HON. JOSEPH M. McLAUGHLIN, HON. PETER W. HALL, HON. JOHN R. GIBSON, * Circuit Judges.

* The Honorable John R. Gibson, Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the

judgment of said district court be and it hereby is AFFIRMED.

Plaintiff-Appellant Lindbirgh Lockhart appeals from a March 29, 2004 judgment of the United States District Court for the Eastern District of New York (Arlene R. Lindsay, Magistrate Judge) granting summary judgment to defendant-appellee Hofstra University. On appeal, Lockhart argues that the district court erred when it concluded that Lockhart could not establish a *prima facie* case for discrimination based on race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17. Familiarity with the facts and proceedings below is assumed. We affirm.

We review a district court's grant of summary judgment de novo. *See Okemo Mountain, Inc. v. U.S. Sporting Clays Ass'n*, 376 F.3d 102, 104 (2d Cir. 2004). In an employment discrimination case, a plaintiff has the burden of showing at the outset that (1) he belongs to a racial minority; (2) he applied and was qualified for the job; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discriminatory intent. *See Sanders v. New York City Human Res. Admin.*, 361 F.3d 749, 755 (2d Cir. 2004).

Lockhart failed to put forward facts that satisfy the third and fourth requirements of the prima facie case. An "adverse [employment] action is one that affects the terms, privileges, duration or conditions of employment." *Yerdon v. Henry*, 91 F.3d 370, 378 (2d Cir. 1996). The only employment statistics on Lockhart's overtime before the district court came from Hofstra. On a motion for summary judgment, a court ordinarily must construe all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *Quinn v. Green Tree Credit Corp.*,

159 F.3d 759, 764 (2d Cir. 1998). Here, however, Hofstra offered evidence of Lockhart's overtime hours and that of his co-workers, and Lockhart offered no contrary evidence. Thus, it was proper for the district court to rely on Hofstra's figures. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995) ("When the defendant moves for summary judgment on the ground that there is an absence of evidence to support this essential element, the plaintiff's burden of producing such evidence in opposition to the motion is de minimis. Nonetheless, the plaintiff cannot meet this burden through reliance on unsupported assertions.") (internal citations omitted). As Hofstra's figures make clear, Lockhart worked more overtime hours between 1998 and 2001 than did his co-workers, notably more than all but one of his white co-workers. Furthermore, Lockhart was offered certain emergency overtime opportunities and declined to accept them. Thus, he cannot establish that he has suffered an adverse employment action.

Lockhart also fails to allege facts that would support an inference of racially discriminatory intent. Lockhart is black, and he alleges that his superiors ignored a seniority-based overtime assignment list and instead favored Hispanic and white custodians in handing out overtime assignments. He alleges that this practice is discriminatory regardless of the actual hours worked. These opportunities, however, which Lockhart alleges were wrongly diverted to his Hispanic and white co-workers, were the very overtime opportunities for which he declined to be considered. Thus, the facts he alleges raise no inference of discriminatory intent.

We have carefully considered Lockhart's remaining arguments and find them to be without merit.

For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 01-6547 (ARL)

[March 29, 2004]

LINDBIRG LOCKHART,)
Plaintiff,)
)
v.)
)
HOFSTRA UNIVERSITY,)
Defendant.)
)

DECISION AND ORDER

Plaintiff Lindberg Lockhart has brought this action against defendant Hofstra University ("the University") alleging that the defendant discriminated against him in the assignment of overtime on account of his race in violation of the Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. (Compl. ¶¶ 1, 14, 20-23).

Presently before the court is defendant's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. The parties have consented to the disposition of this action by a Magistrate Judge pursuant to 28 U.S.C.

§ 636(c). For the reasons set forth below, the motion is GRANTED.

I. The Undisputed Facts[1]

Plaintiff is an African-American employed by the University as a custodian in its Physical Plant Department. (Compl. at ¶¶ 14, 16; Pl. Dep. at 13; Def. 56.1 Statement at ¶ 2). He is responsible for the cleaning and maintenance of the building located on the University's South Campus. (Pl. Dep. at 9-10; Def. 56.1 Statement at ¶ 3; P1.56.1 Statement at ¶ 13). Plaintiff has held this position since 1990 and has continuously reported to Michael Rocchio, Assistant Director of the Physical Plants Department at the University. (Pl. Dep. at 21-22; Def. 56.1 Statement at ¶ 4; P1.56.1 Statement at ¶ 15). Mr. Rocchio is Caucasian. (Pl. Aft. at 1 22; Rocchio Dep. at 18). In addition to Mr. Rocchio, there are six other custodial managers, each with responsibility for his own crew of custodians. (Tyler Dep. at 9; Def. 56.1 Statement at ¶ 7).

The custodial workforce at the University is unionized. (Tyler Decl. at ¶ 4; Def. 56.1 Statement at ¶ 9; PI. 56.1 Statement at ¶ 8). The collective bargaining agreement ("the CBA") governing the employment relationship between the University, and the union members, including the plaintiff, has an express overtime provision. (Compl. at ¶ 18; Ex. 1 to

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[1] Pursuant to Local Civil Rule 56. l(a), defendant has submitted a statement of material facts as to which it contends that there is no genuine issue to be tried. In response, plaintiff has submitted a counter-statement pursuant to Local Civil Rule 56. l(b) that fails to address all of the facts set forth in defendant's statement. Accordingly, those factual averments that have not been controverted by plaintiff's counter-statement are deemed admitted pursuant to Local Civil Rule 56. l(c).

the Decl. of Aimee M. Florin; Def. 56.1 Statement at ¶16; P1.56.1 Statement at ¶¶ 17-18). The CBA provides, in relevant part, that "[o]vertime shall be computed on a daily and weekly basis .... The Chief Shop Steward shall divide any overtime in conjunction with management on a voluntary seniority basis." (Def. 56.1 Statement at ¶ 17; PI. 56.1 Statement at ¶ 17). The CBA does not require that the University maintain a list containing the names of employees ranked by seniority from which the overtime assignments are made. (P1. Dep. at 124-26; Def. 56.1 Statement at ¶ 18). Likewise, the CBA is silent on whether the individual selected for a particular overtime assignment should be the most senior on a campus-wide basis or by location worked. (Ex. 1 to PI. 56.1 Statement).

A. Process By Which Overtime Is Assigned

Each of the seven custodial managers maintains his own seniority-based overtime list. (Roccio Dep. at 3 l, 33; Def. 56.1 Statement at ¶ 29; Tyler Dep. at 13). According to defendant, multiple lists are used because custodians provide coverage seven days a week, 24 hours a day and if only one list were used, individuals would often have to decline an overtime assignment because it would conflict with their regular work hours. (Tyler Dep. at 14-15, 41; Tyler Decl. at ¶ 11 ; Def. 56.1 Statement at ¶ 30). In addition, defendant states that multiple lists are used so that custodial managers can assign overtime jobs to individuals in their regular work areas. (Tyler Dep. at 41-42; Tyler Decl. at ¶ 13).

When overtime hours are available, the custodial manager requests from the Union a number of people to work that overtime assignment. The Union, in conjunction with the custodial manager, then compiles a list of individuals who will work the requested overtime. (Tyler Dep. at 13; Rocchio

Dep. at 29, 37; Def. 56.1 Statement at ¶ 25, P1.56.1 Statement at ¶ 21). The custodial manager then assigns the individuals to the particular overtime assignment. (Rocchio Dep. at 26; Def. 56.1 Statement at ¶ 25).

There are exceptions when the seniority-based overtime lists are not utilized in assigning overtime. (Rocchio Dep. at 43-44; Def. 56.1 Statement at ¶ 33). For example, defendant asserts that the custodial foreman is regularly required to oversee certain overtime jobs and receives overtime pay for such work but is not listed on the seniority-based lists. (Rocchio Dep. at 58-59: Tyler Dep. at 28-29; Tyler Decl. at ¶ 15; Def. 56.1 Statement at ¶ 35). Also, defendant claims that individuals with special skills, such as equipment repair, may receive overtime assignments even if they are not included on the seniority-based overtime lists. (Rocchio Dep. at 58-59; Tyler Dep. at 28-29; Tyler Decl. at ¶ 15; Def. 56.1 Statement at ¶ 36). In addition, according to defendant, when there are a limited number of custodians who work in a particular area of the campus and that area consistently generates overtime assignments, those individuals may regularly be offered the overtime assignments in their work area irrespective of the seniority-based overtime lists. (Rocchio Dep. at 55-56; Def. 56.1 Statement at ¶ 34).

B. Plaintiff's Overtime Assignments

From 1998-2001, the plaintiff worked a total of 1156.25 overtime hours. (Tyler Decl. at ¶ 17 and Ex. 1; Def. 56.1 Statement at ¶ 19). The average number of overtime hours during that time period for plaintiff's fourteen Hispanic co-workers was 1150 hours. (Tyler Decl. at ¶ 18 and Exs. 1-2; Def. 56.1 Statement at ¶ 20). During that same time period, the average number of overtime hours for plaintiff's fourteen Caucasian co-workers was 420 hours. (Tyler Decl. at ¶ 19

and Exs. 1-2; Def. 56.1 Statement at ¶ 21). The average number of overtime hours for the African-American custodians assigned to the South Campus, including plaintiff, was 703.18 hours. (Exs. 1-2 annexed to the Tyler Decl.).

In addition to the overtime hours actually worked, plaintiff was offered the opportunity to work "off-list" overtime by the Chief Shop Steward, but declined. (Def. 56.1 Statement at ¶ 38). Plaintiff was also included on the "emergency" overtime list which provided him with the opportunity to work additional overtime assignments. (*Id.* at ¶ 39). However, he requested that he be removed from that list. (*Id.*).

C. Plaintiff's Union Membership

From 1978 to 1990, plaintiff was employed by Trans World Maintenance Corporation, a company that provided custodial services to the University. (P1.56.1 Statement at ¶ 2; Def. 56.1 Statement at ¶ 1). During that time, he served as Chief Shop Steward of Local 144 and had responsibility, in consultation with management, for assigning overtime or selecting people for overtime. (*Id.* at ¶¶ 4-5; Def. 56.1 Statement at ¶ 10). Plaintiff selected people for overtime based upon seniority and referred to the seniority list that covered the entire Hofstra campus. (Id. at ¶ 6). In 1988, the custodians working at the University, including plaintiff, became members of Local 424 of the United Industry Workers. (*Id.* at 18).

In August of 1990, plaintiff became employed directly by the defendant and moved from Chief Shop Steward to Assistant Shop Steward. (*Id.* at ¶¶ 7, 9; Def. 56.1 Statement at ¶ 2, 13). As Assistant Shop Steward, plaintiff was responsible for selecting people for overtime only in the

absence of the Chief Shop Steward. (*Id.* at ¶ 11). Approximately one year later, plaintiff resigned from the Assistant Shop Steward position. (Def. 56.1 Statement at ¶ 14).

In February, 1996, plaintiff filed a grievance with the Union complaining about the distribution of overtime. (*Id.* at ¶ 35; Def. 56.1 Statement at ¶ 40; *see also* Ex. G to the Lockhart Aff.). In that grievance, plaintiff complained that, for the past four years, "off-list" overtime had been given to six particular individuals in violation of the collective bargaining agreement. (Def. 56.1 Statement at ¶ 41; Ex. G. to the Lockhart Aff.). Of those named as having received preferential treatment with respect to the assignment of overtime, there were two African-Americans, Jimmy Adams and Michael Black. (Ex. G to the Lockhart Aff.; Def. 56.1 Statement at 42.). According to plaintiff, his grievance was not remedied. (Pl. 56.1 Statement at ¶ 36).

II. The Plaintiff's Claims

Plaintiff claims that, beginning in 1998, defendant regularly approved overtime assignments for custodians in disregard of the rotation provided for in the official overtime list.[2] (Compl. at ¶ 19). This distribution of overtime assignments, plaintiff alleges, intentionally favors Caucasian and Hispanic custodians at the expense of African-Americans.

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[2] It is important to note that plaintiff concedes that "he has received his fair share of overtime within the past two years" and challenges only the assignment of overtime from 1998 to 2001. (PI. Dep. at 40; P1.56.1 Statement at ¶ 28).

Accordingly, plaintiff filed a charge of discrimination with the New York State Division of Human Rights ("NYSDHR") on December 4, 1998. (Compl. at ¶ 6). The charge was dual filed with the Equal Employment Opportunity Commission ("EEOC"). (Id.). On May 22, 2001, after a fact finding hearing, the NYSDHR dismissed the charge and issued a finding of No Probable Cause. (Def. 56.1 Statement at ¶ 50). On July 11, 2001, the EEOC issued a "Notice of Right to Sue" and plaintiff commenced this action on October 3, 2001. (Compl. at ¶ 8).

DISCUSSION

I. Standards Governing a Motion for Summary Judgment

A motion for summary judgment may be granted only when it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Lang v. Retirement Living Pub. Co.,* 949 F.2d 576,580 (2d Cir. 1991).

The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," and identifying which materials "it believes demonstrate the absence of a genuine issue of material fact." *Celotex,* 477 U.S. at 323; *see also Trebor Sportswear Co. v. The Ltd. Stores, Inc.,* 865 F.2d 506.511 (2d Cir. 1989). The substantive law governing the case will identify those facts that are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc,* 477 U.S. 242,248, 106 S. Ct. 2505, 2510 (1986).

Once the moving party has come forward with support demonstrating that no genuine issue of material fact remains to be tried, including pleadings, depositions, interrogatory answers, and affidavits, the burden shifts to the non-moving party to provide similar support setting forth specific facts about which a genuine triable issue remains. See Fed. R. Civ. P. 56(e); see also *Anderson,* 477 U.S. at 250, 106 S. Ct. at 2511; *Borthwick v. First Georgetown Sec., Inc.,* 892 F.2d 178, 181 (2d Cir. 1989). The court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *Anderson,* 477 U.S. at 254-55, 106 S. Ct. 2513. Moreover, the court's role on a motion for summary judgment "in short, is confined.., to issue-finding; it does not extend to issue-resolution." *Gallo v. Prudential Residential Servs., Ltd. Partnership,* 22 F.3d 1219, 1224 (2d Cir. 1994); *see also Consarc Corp. v. Marine Midland Bank, N.A.,* 996 F.2d 568,572 (2d Cir. 1993).

In evaluating the record to determine whether there is a genuine issue as to any material fact, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson,* 477 U.S. at 255,106 S. Ct. at 2513. "If, as to any issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *Chambers v. TRM,* 43 F.3d 29, 37 (2d Cir. 1994).

In a discrimination case, the court must examine "the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.'" *Schnabel v. Abramson,* 232 F.3d 83, 90 (2d Cir. 2000)

(quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133,143,120 S.Ct. 2097, 2106 (2000)).

II. Defendant's Motion

Defendant moves for summary judgment contending that plaintiff cannot establish a *prima facie* case of race discrimination under Title VII. Defendant also asserts, assuming plaintiff can establish a *prima facie* case, that it has set forth a legitimate, nondiscriminatory reason for the manner in which overtime is assigned and plaintiff has not offered any competent evidence to show that defendant's legitimate nondiscriminatory reason was pretextual. Accordingly, defendant contends that it is entitled to summary judgment and plaintiff's complaint should be dismissed in its entirety.

A. Title VII Standards

Plaintiff's Title VII claim of discriminatory treatment on account of his race is analyzed pursuant to the three-step burden shifting test of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04, 93 S. Ct. 1817, 182.4-25 (1973), *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248,252-53, 101 S. Ct. 1089, 1093 (1981), and *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506-08, 113 S. Ct. 2742, 2746-47 (1993).

Under this framework, the plaintiff must establish, by a preponderance of the evidence, a *prima facie* case of discrimination. A *prima facie* case of race discrimination under Title VII requires that the plaintiff demonstrate that: (1) he is a member of protected class; (2) he was qualified for the position held; (3) he suffered an adverse employment action; and (4) the adverse action arose under circumstances giving

rise to an inference of discrimination. *See McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at I824 and its progeny. These requirements for establishing a *prima facie* case are "minimal." *Fisher v. Vassar College,* 114 F.2d 1332, 1335 (2d Cir. 1997) (quoting *St. Mary's Honor Ctr.,* 509 U.S. at 506, 113 S. Ct. at 2747; *Cronin v. Aetna Life Ins Co.*, 46 F.3d 196, 203-04 (2d Cir. 1995).

If the plaintiff demonstrates a *prima facie* case, a presumption that the employer unlawfully discriminated against the employee is raised, *see Fisher v. Vassar College,* 114 F.3d 1332, 1335 (2d Cir. 1997), and the burden of production then shifts to the employer "to articulate a legitimate, clear, specific and non-discriminatory reason" for the adverse employment action at issue. *Gallo*, 22 F.3d at 1226. If the employer satisfies this burden, the presumption raised by *the prima facie* case is rebutted and the burden is then on the plaintiff to show by a preponderance of the evidence that the employer's reason is a pretext for unlawful discrimination. *Kerzer v. Kingly Manufacturing,* 156 F.3d 396,401 (2d Cir. 1998).

B. Proof of a *Prima Facie* Case of Race Discrimination

It is undisputed, for the purposes of defendant's summary judgment motion, that plaintiff has satisfied the first two elements of a *prima facie* case: (1) plaintiff is a member of a protected class; and (2) he was qualified for his position as a custodian with defendant.

The dispute revolves around the third and fourth elements. Defendant asserts that the plaintiff has not suffered an adverse employment action, and, even if he had, the alleged adverse employment action did not arise under circumstances giving rise to an inference of race discrimination.

More specifically, defendant contends that during the relevant time period (1998 - 2001), plaintiff worked, on average, more overtime hours than nine of his Hispanic co-workers and all but one of his Caucasian co-workers. Because plaintiff's overtime hours are greater, on average, than the majority of his Hispanic and Caucasian counterparts, defendant asserts that plaintiff suffered no adverse employment action as a matter of law.

Plaintiff's response to this argument is two-fold. First, plaintiff disputes the number of overtime hours that defendant claims that he worked as compared to the other employees.[3] Second, the court discerns from plaintiff's papers that it is the missed opportunities for overtime that he was allegedly denied on account of his race that are the adverse employment actions suffered, irrespective of the total overtime hours worked.

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[3] The court regards the overtime hours that defendant claims plaintiff worked as true. Defendant has supported its calculation of plaintiff's overtime hours with documentary evidence reflecting not only plaintiff's overtime hours, but also that of his similarly situated co-workers. Plaintiff self-serving statement that he "disputes the overtime hours that defendant claims he worked" is insufficient as a matter of law to rebut the defendant's evidence. *See e.g., Goenaga v. March of Dimes Birth Defects Foundation,* 51 F.3d 14, 18 (2d Cir. 1995). This rule is particularly applicable here in light of the fact that plaintiff has failed to provide any contrary evidence despite his deposition testimony that he has paycheck stubs that prove that the defendant's calculation is in error. *See* Lockhart Depo. at 86.

i. Whether Plaintiff Suffered An Adverse Employment Action Within The Meaning of Title VII

It is well-settled that "[a]n adverse action is one that affects the terms, privileges, duration or conditions of employment." *See, e.g., Yerdon v. Henry,* 91 F.3d 370, 378 (2d Cir. I996) (citations omitted). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss in benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Galabya v. New York City Bd. of Educ.,* 202 F.3d 63655, 640 (2d Cir. 2000).

"Adverse action" in Title VII cases has not been defined "solely in terms of job termination or reduced wages and benefits, and that less flagrant reprisals by employers may indeed be adverse. *Wanamaker v. Columbian Rope Co.,* 108 F.3d 462,466 (2d Cir. 1997) "There are no bright-line rules. Courts must consider the facts of each case to determine whether the challenged action reaches the level of 'adverse.'" (*Id.*). Moreover, "[i]t is a court's responsibility to 'pore over each case to determine whether the challenged employment action reaches the level of 'adverse'.'" *Ruggieri v. Harrington,* 146 F. Supp.2d 202, 215 (E.D.N.Y. 2001) (citations omitted).

The issue here is whether the denial of the opportunity to work overtime assignments rises to the level of an actionable adverse employment action under Title VII. The court finds that it does. While such a denial may not be tantamount to a termination of employment, the denial of the opportunity to work overtime assignments affects a term and condition of employment and may constitute an adverse employment action. *See Austin v. Ford Models, Inc.,* 149 F.3d 148, 152

(2d Cir. 1998) (finding that allegations of denial of overtime pay were sufficient to meet element *of prima facie* case of disparate treatment); *Austin v. Ford Models*, 2000 WL 1752966, No. 95 Civ 3731 (AJP), (S.D.N.Y. Nov. 29, 2000) ("It is also arguable that [plaintiff] suffered an adverse employment action in not receiving overtime compensation"); *Hall v. South Central Connecticut Regional Water Authority*, 28 F. Supp.2d 76 (D. Conn. 1998) ("Making overtime or job assignments... based upon an employee's gender or race can constitute actionable discrimination under Title VII").

While denial of overtime assignments may be an adverse employment action, such is not the case here. Plaintiff has not suffered any adverse employment action because his overtime hours compare favorably with the average number of overtime hours worked by his Hispanic and Caucasian counterparts. Moreover, in addition to the plaintiff having worked more overtime hours than several of his colleagues, plaintiff was offered the opportunity to work additional "off-list" overtime and/or "emergency" overtime and declined. Plaintiff can hardly support a claim of discrimination based on missed overtime opportunities when he deliberately removed himself from consideration for such opportunities. There is simply no evidence to support the claim that race discrimination is why plaintiff has fewer overtime hours than some of his Caucasian and Hispanic colleagues. Rather, his own decision to decline additional overtime assignments, for whatever reason,[4] sufficiently explains why plaintiff's total

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[4] Plaintiff apparently believes that "off-list" overtime assignments violate the collective bargaining agreement. Whether his belief is correct is irrelevant here because his own declination of overtime opportunities belies his claim of race discrimination.

overtime hours are lower than those of some of the other employees.

ii. Whether the Alleged Denial of Overtime Opportunities Occurred

Under circumstances giving rise to an inference of race discrimination defendant argues that the employment actions of which plaintiff complains did not occur under circumstances giving rise to an inference of discrimination. (Def. Mere. at 8-16). While plaintiff's burden in establishing a *prima facie* case of disparate treatment is *"de minimus" McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir. 1995), he has failed to present any evidence sufficient to support an inference of race discrimination. This court finds that plaintiff has not presented any facts sufficient to support the last element of the *prima facie* case. Importantly, plaintiff does not contend that he never received overtime assignments. Rather, he asserts that the overtime opportunities were offered to his Caucasian and Hispanic colleagues in disregard of the seniority-based overtime list. It is this procedure that plaintiff alleges is discriminatory, irrespective of the actual overtime hours he worked.

However, plaintiff ignores the critical fact that he removed himself from receiving additional overtime hours by refusing those "off-list" opportunities offered to him. This fact standing alone, defeats plaintiff's claim that his race had anything to do with his overtime assignments.[5]

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[5] To the extent that plaintiff asserts that persons other than he may have been denied the opportunity to work off-list overtime, he lacks standing to assert such claims. *See, e.g., Murphy v. Board of Education of Rochester City School District*, 273 F. Supp. 2d 292,

Although a "'trial court must be cautions about granting summary judgment'" when a case turns on the intent of one party, as employment discrimination claims often do, *Gallo v. Prudential,* 22 F.3d at 1224, this court finds that there simply no evidence of race discrimination here. Accordingly, the court finds that plaintiff has failed to set forth a *prima facie* case of race discrimination.

iii. Legitimate, Nondiscriminatory Reason

Even if the court were to find that plaintiff had established *a prima facie* case, defendant has met its burden to articulate a legitimate, nondiscriminatory reason for the assignments at issue. More specifically, defendant asserts three reasons: (1) for efficiency purposes, where there are a limited number of custodians who work in a particular area of the campus and that area consistently generates overtime hours, those custodians may regularly be offered the overtime generated in their work area instead of referring to the seniority-based lists (Def. 56.1 Statement at ¶ 34); (2) the custodial foreman, who is regularly required to oversee certain overtime jobs, receives overtime even though he is not included on the seniority-based overtime lists (*Id.* at ¶ 35); and (3) individuals with special skills, such as equipment repair, may receive overtime hours even if they are not included on the seniority-based overtime lists. (*Id.* at ¶ 36).

The court finds that the reasons asserted by defendant are sufficient to satisfy its burden of articulating a legitimate,

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302-03 (W.D.N.Y. 2003) (citing *Vermont Right to Life Committee, Inc. v. Sorrell,* 221 F.3d 376, 382 (2d Cir. 2000)).

nondiscriminatory reason for the overtime assignments at issue.

iv. Nondiscriminatory Reasons Are Pretextual

Because defendant has put forth "a legitimate non-discriminatory reason" for the overtime assignments at issue, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S. Ct. 2097 (2000) (quoting *Texas Dep't of Cmty Affairs v. Burdine,* 450 U.S. 248, 254, 101 S. Ct. 1089 (1981)), "the burden shifts back to the plaintiff to prove, by a preponderance of the evidence, that the real reason for the adverse employment action was discrimination." *Mandell v. County of Suffolk*, 316 F. 3d 368,381 (2d Cir. 2003).

Plaintiff does not satisfy his burden. Plaintiff merely concludes that defendant's articulated reasons are a pretext for race discrimination, but fails to offer any supporting evidence. In fact, of the three reasons proffered by the defendant, plaintiff addresses only the "special skill" rationale, and assert that it is a pretext because one of the highest overtime earners, James Avellone (who is Caucasian), "is not even licensed to repair vacuums." (Def. Mem. at 11). The court finds that this unsupported claim is insufficient to prove that the defendant's reason is a pretext for race discrimination for several reasons. First, there is no evidence in the record to support plaintiff's conclusion that the "special skill" rational corresponds to the overtime assignments worked by Mr. Avellone or that he worked overtime assignments repairing vacuums. Second, even if there were such evidence before this court, there is no evidence establishing that a license is even required. Simply stated, the unsupported fact that Mr. Avellone may not be licensed to repair vacuums is wholly irrelevant to the central issue of whether defendant's

justification for the manner in which overtime assignments were made is a pretext for race discrimination.

Accordingly, this court finds that there is no basis to conclude that defendant's reasons for making off-list overtime assignments is a pretext for unlawful discrimination. Defendant has presented nondiscriminatory reasons for its assignment of overtime, and plaintiff has not presented evidence such that a jury could find that he has rebutted this proffer or established the necessary discriminatory intent by a preponderance of the evidence. Whether or not the assignment of overtime was done fairly or even consistently with the collective bargaining agreement is not relevant, absent some indication that plaintiff's race had anything to do with such assignments. Nothing in the record indicates discriminatory animus and plaintiff's evidence has not placed any of the material issues, those concerning defendant's proffered nondiscriminatory reasons for the assignment of overtime, into genuine dispute. Accordingly, summary judgment in favor of defendant is appropriate.

CONCLUSION

For the reasons stated herein, defendant's motion for summary judgment is GRANTED in all respects. The complaint is dismissed. SO ORDERED.

Dated: Central Islip, New York
March 29, 2004

/s/_____
ARLENE ROSARIO LINDSAY
United States Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-01-6547 (ARL)

[March 29, 2004]

LINDBIRGH LOCKHART,
Plaintiff,

v.

HOFSTRA UNIVERSITY,
Defendant.

JUDGMENT

A Decision and Order of Honorable Arlene R. Lindsay, United States Magistrate Judge, having been filed on March 29, 2004, granting defendant's motion for summary judgment, and dismissing the complaint, it is

ORDERED AND ADJUDGED that plaintiff take nothing of defendant; that defendant's motion for summary judgment is granted; and that the complaint is dismissed.

DATED: Long Island, New York
March 29, 2004

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/ Ralph Branciforte
Deputy Clerk

(2)

No. 04-1558

Supreme Court, U.S.
FILED
JUN 17 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LINDBIRG LOCKHART,

Petitioner,

v.

HOFSTRA UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the well-reasoned grant of summary judgment by the United States District Court for the Eastern District of New York in favor of Respondent Hofstra University in a single plaintiff race discrimination case and the decision of the United States Court of Appeals for the Second Circuit to affirm that grant of summary judgment raises a compelling issue of law so as to justify the "exercise of [the] Court's supervisory power" to grant a petition for writ of certiorari?

2. Whether the District Court properly granted summary judgment, and the Second Circuit properly affirmed the grant of summary judgment, dismissing Petitioner's Title VII claim because Petitioner could not meet his burden to establish a *prima facie* case of race discrimination?

3. Whether the District Court properly granted summary judgment, and the Second Circuit properly affirmed the grant of summary judgment, dismissing Petitioner's Title VII claim because Petitioner could not meet his burden to prove that Respondent's legitimate, nondiscriminatory reason for the assignment of certain overtime was a pretext for discrimination and that discriminatory animus was the real reason for the manner in which certain overtime was assigned?

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OPINIONS AND ORDERS BELOW

The Decision and Order of the United States District Court for the Eastern District of New York granting Respondent's motion for summary judgment in all respects and dismissing Petitioner's Complaint in its entirety (Pet. App. B at 5a-21a) and the Judgment of the United States District Court for the Eastern District of New York ordering that Respondent's motion for summary judgment is granted and that the Complaint is dismissed (Pet. App. C at 22a-23a) are unreported. The Summary Order of the United States Court of Appeals for the Second Circuit affirming the judgment of the District Court granting Respondent's motion for summary judgment (Pet. App. A at 1a-4a) is reported at 2005 WL 387900 (2d Cir. Feb. 18, 2005).

BASIS FOR JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was issued on February 18, 2005. The petition for a writ of certiorari was filed on May 18, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

The Rule involved is Federal Rule of Civil Procedure 56(c) which provides, in pertinent part:

Summary Judgment.

> . . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together

> with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

STATEMENT OF THE CASE

The crux of Petitioner's claim is that from 1998 to 2001, while working as a custodian for Respondent Hofstra University ("Hofstra" or "Respondent"), Respondent discriminated against him on the basis of his race (Black) by denying him overtime hours while approving overtime hours for custodians who are Caucasian or Hispanic.

Petitioner, who is currently employed by Hofstra as a custodian, has reported to Michael Rocchio, Assistant Director of the Physical Plants Department at Hofstra, since 1990. (Pet. App. B at 6a). (Pet. App. B at 6a). In addition to Mr. Rocchio, there are six other custodial managers, each with responsibility for his own crew of custodians. (Pet. App. B at 6a).

The custodial workforce at Hofstra is unionized and the collective bargaining agreement ("CBA") governing the employment relationship between Hofstra and the union members, including Petitioner, has an express overtime provision. (Pet App. B at 6a). The CBA provides, in relevant part, that "[o]vertime shall be computed on a daily and weekly basis. . . . The Chief Shop Steward shall divide any overtime in conjunction with management on a voluntary seniority basis." (Pet. App. B at 7a).

The CBA does not require that Hofstra maintain a list containing the names of employees ranked by seniority from

which the overtime assignments are made nor does the CBA require that the individual selected for a particular overtime assignment must be the most senior on a campus-wide basis or by location worked. (Pet. App. B at 7a).

Each of the seven custodial managers maintains his own seniority-based overtime list. (Pet. App. B at 7a). Because the custodians provide coverage seven days a week, 24 hours a day, multiple lists are used to avoid the assignment of overtime which conflicts with regular work hours. (Pet. App. B at 7a). Multiple lists are also used so that custodial managers can assign overtime jobs to individuals in their regular work areas. (Pet. App. B at 7a).

Generally, when overtime hours are available, the custodial manager requests from the Union a number of people to work that overtime assignment. (Pet. App. B at 7a). The Union, in conjunction with the custodial manager, then compiles a list of individuals who will work the requested overtime and the custodial manager assigns the individuals to the particular overtime assignment. (Pet. App. B at 7a-8a).

There are, however, exceptions when the seniority-based overtime lists are not utilized. (Pet. App. B at 8a). For example, the custodial foreman is regularly required to oversee certain overtime jobs and receives overtime pay for such work even though he is not listed on the seniority-based lists. (Pet. App. B at 8a). Also, individuals with special skills, such as equipment repair, may receive overtime assignments even if they are not included on the seniority-based overtime lists. (Pet. App. B at 8a). And, when there are a limited number of custodians who work in a particular area of the campus and that area consistently generates overtime

assignments, those custodians may regularly be offered the overtime assignments in their work area irrespective of the seniority-based overtime lists. (Pet. App. B at 8a).

In February 1996, Petitioner filed a grievance with the Union complaining about the distribution of "off-list" overtime to six particular individuals in violation of the CBA. (Pet. App. B at 10a). Of those Petitioner claimed received preferential treatment with respect to the assignment of overtime, two were Black, Jimmy Adams and Michael Black. (Pet. App. B at 10a).

Petitioner concedes that "he has received his fair share of overtime within the past two years" and challenges only the assignment of overtime from 1998 to 2001. (Pet. App. B at 10a n. 2). From 1998-2001, Petitioner worked a total of *1156.25* overtime hours. (Pet. App. B at 8a). The average number of overtime hours during that time period for Petitioner's fourteen Hispanic co-workers was *1150* hours. (Pet. App. B at 8a). During that same time period, the average number of overtime hours for Petitioner's fourteen Caucasian co-workers was *420* hours. (Pet. App. B at 8a-9a).

In addition to the overtime hours actually worked, Petitioner was offered the opportunity to work "off-list" overtime by the Chief Shop Steward, but declined. (Pet. App. B at 9a). Petitioner was also included on the "emergency" overtime list which provided him the opportunity to work additional overtime assignments, but he requested that he be removed from that list. (Pet. App. B at 9a).

SUMMARY OF ARGUMENT

In direct contravention of the Rules of this Court, Petitioner seeks review of the dismissal of his individual race discrimination claim despite the fact that he does not assert – let alone provide any support for – even one of the limited number of compelling reasons recognized by the Court as justification for such a grant.

Indeed, by filing the instant petition based on his assertion that fact issues existed such that the lower courts incorrectly granted summary judgment for Respondent, Petitioner disregards completely the Court's explicit admonishment that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, Rules of the Supreme Court of the United States.

Even if, however, the Court did choose to exercise its supervisory powers to consider the question before it, the undisputed evidence in the record makes clear that the District Court correctly found – and the Court of Appeals properly affirmed – that there were no issues of fact requiring a trial in this matter. Thus, summary judgment dismissing Petitioner's Title VII race discrimination claim was appropriately entered.

In particular, as recognized by the District Court – and undisputed by Petitioner in his appeal to the Second Circuit – Petitioner cannot establish even a *prima facie* case of race discrimination because he has not suffered any adverse employment action. (Pet. App. B at 17a). Nor can Petitioner establish that overtime was distributed under circumstances

giving rise to an inference of race discrimination where "he removed himself from receiving additional overtime hours," (Pet. App. B at 18a), a fact which Petitioner did not dispute on appeal.

Further, the District Court properly held that even if Petitioner had established a *prima facie* case, Respondent met its burden of articulating a legitimate, nondiscriminatory reason for the overtime assignments at issue and, as a matter of law, that Petitioner offered no evidence to even suggest that his race "had anything to do with such [overtime] assignments." (Pet. App. B at 21a). Again, Petitioner's appeal offered nothing to contradict this finding and the Second Circuit correctly found that "the facts [Petitioner] alleges raise no inference of discriminatory intent." (Pet. App. A at 3a).

Petitioner's purported claim that the courts below "did not adhere to this Court's established principles concerning summary judgment," is nothing more than a restatement of his opposition to Respondent's motion for summary judgment, which opposition was already rejected after due consideration by both the District Court and the Court of Appeals.

The lower courts applied the proper legal standard and appropriately assessed the evidence in the record in granting and affirming Respondent's motion for summary judgment.